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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DYLAN ANTHONY ENDERS, Defendant and Appellant.	H031941 (Monterey County Super. Ct. No. SS040870)

Following a preliminary examination held in March 2004, the Monterey County District Attorney (hereafter, the People) filed an information on April 7, 2004, charging defendant Dylan Anthony Enders with being a felon in possession of a firearm and ammunition (Pen. Code, §§ 12021, subd. (a)(1), 12316, subd. (b)(1);[1] counts 1 & 2), concealing a firearm in a vehicle (§ 12025, subd. (a)(3); count 3), carrying a loaded firearm (§ 12031, subd. (a)(1); count 4), receiving stolen property (§ 496, subd. (a); count 5), and participating in a criminal street gang (§ 186.22, subd. (a); count 6). The information further alleged that defendant committed the offenses in counts 1 through 5 for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(1)), and that defendant was not the registered owner of the firearm involved in counts 3 and 4.

[1] All further statutory references are to the Penal Code.

In November 2004, the matter was dismissed on motion of the People in the interest of justice pursuant to section 1385.

In September 2005, defendant filed a petition seeking a finding of factual innocence. (§ 851.8, subd. (c).) The People opposed the petition. Following a hearing at which both parties presented testimony and documentary evidence, the court filed a 12-page decision and order on June 12, 2007, denying the petition. Defendant appeals from the trial court's order, contending that the court erred in denying the petition. We will remand the matter to the trial court.

BACKGROUND

The Preliminary Examination Testimony

On February 2, 2004, Salinas police officers conducted surveillance on an address on Park Way in Salinas associated with David Sexton, a Norteño gang member wanted on a weapons charge. The officers saw a red Ford Escort stop at the address. They ran the license plate on the Escort and determined that the plate belonged to a Honda, so the Escort was possibly stolen. They passed this information on to other patrol units in the area and asked them to stop the Escort.

Around 3:56 p.m. on February 2, 2004, Officers Gilbert Bacis and Vicky Burnett were in uniform in a patrol car on North Sanborn Road at East Alisal Street. They had received the information about the Escort around five to 10 minutes earlier, and they saw the Escort approach them. Officer Bacis, the passenger in the patrol car, got a good look at the passenger in the Escort for 30 to 40 seconds while they were stopped at a signal. The passenger in the Escort appeared to Officer Bacis to have a light complexion, a thin build, short hair, a goatee, and distinctive eyebrows and sunken eyes, and he was wearing a white T-shirt. Officer Bacis thought the driver of the Escort was a stocky male with a light complexion.

The officers activated their lights and siren and attempted to stop the Escort, but the Escort kept going. The officers pursued the Escort as it made many turns, failed to

stop at stop signs and signals, and broadsided a car in an intersection. When the Escort turned left onto Kenneth Street from Market, Officer Bacis saw the passenger wipe down a gun and then throw the gun and a red bandana out the passenger-side window. The officers stopped their pursuit and picked up the gun, which was a .45 caliber semi-automatic with a full magazine but no chambered rounds. The officers later learned that the gun was reported stolen in Lake County.

Officers found the Escort on Kimmel Street later the same day. Pablo Munoz saw two teenaged Hispanic men pull up in the Escort in front of his home on Kimmel Street around 4:00 p.m. on February 2, 2004. The men jumped out of the car, grabbed a car battery from the back seat, and ran around the corner. The driver had a mustache and the passenger was wearing a red shirt and had a goatee. Officers lifted 11 partial fingerprints from the passenger side of the Escort. At least three of the fingerprints were usable but none of them matched defendant's.

Officer Burnett was unable to find a telephone number for the registered owner of the Escort. She determined that the license plate that had been on the Escort belonged on a Honda, but she did not talk to Rosio Sanchez, the registered owner of that Honda. She determined that one of Sanchez's associates, Jose Garcia, resembled the driver of the Escort. She did not talk to Garcia. On February 11, 2004, she put together a lineup consisting of 17 photographs, including one of Garcia and one of defendant, who she thought looked like the passenger. She asked Officer Bacis if he could identify the Escort's passenger. Officer Bacis positively identified defendant's photo after examining all the photos and looking at defendant's photo for about 30 seconds. Officer Bacis also identified defendant at the preliminary examination as the Escort's passenger. Officer Burnett did not show either Munoz or the victims of the intersection accident the photographic lineup. Munoz was shown the photographic lineup at the preliminary examination and testified that none of the people in it was either the passenger or the

driver of the Escort. Munoz also testified that defendant was not one of the men from the car.

In February 2004, defendant was on probation for a misdemeanor domestic violence offense, living in Marina, and gainfully employed. He had Norteño gang tattoos on his arms and his left hand, he had previously associated with Norteño gang members and worn gang clothing, and he had previously admitted membership in a Norteño gang. Officer Burnett arrested defendant on February 22, 2004. Officer Burnett showed defendant Garcia's photograph, and she told defendant that she thought Garcia was the driver of the Escort. Officer Burnett also told defendant that another officer identified him as the passenger in the Escort. Defendant told Officer Burnett that he knew Garcia from jail, but that he had not "kicked with" him and did not really know him well. Defendant said that he was housed with Norteños and followed their rules and regimen while in jail in 2003. He said that he was not the passenger in the Escort and that his fingerprints would not be in the car, and he asked that the officer who identified him be brought in to see him.

The Petition for a Finding of Factual Innocence

On September 14, 2004, defendant filed a pretrial brief stating that he was at work in Monterey the entire afternoon of February 2, 2004. Attached to the brief was a report from a technology expert stating that an examination of a clone of the hard drive from defendant's work computer showed that defendant's computer was in use between 11:26 a.m. and 5:38 p.m. on February 2, 2004. Also attached was a report from a forensic analyst stating that a partial DNA profile was obtained from the red bandana thrown from the Escort, and that defendant was eliminated as the donor of that DNA. However, other DNA was present on the bandana in low levels, and no conclusions could be reached regarding the inclusion or exclusion of defendant or any other individual as a possible contributor to that DNA. Between October 6, and October 15, 2004, defendant filed requests that he be allowed to present at trial the testimony of an expert on

eyewitness identifications, the testimony of the forensic analyst on the DNA testing, and the testimony of the technology expert.

On November 4, 2004, the date for the jury trial setting, the court dismissed the matter on the People's motion pursuant to section 1385 in the interest of justice and for insufficient evidence. The prosecutor stated that she had not been able to eliminate defendant as a suspect because the latent prints they had did not match those of the other suspect that defendant had identified. However, "[t]here is certainly enough of a resemblance in their facial expressions that we would not be able to prove it beyond a reasonable doubt."

Defendant filed a petition for a finding of factual innocence (§ 851.8, subd. (c)) on September 26, 2005. Defendant contended that the driver of the Escort was its owner Leon Martinez; that the passenger was an associate of Martinez's named Orlando Espinosa; that Espinosa is "a dead ringer" for defendant; and that both Martinez and Espinosa "have made damaging admissions to" a defense investigator. Therefore, defendant contended that Officer Bacis was "honestly mistaken" when he picked defendant out of the photographic lineup, and that other evidence supported defendant's claim that he was at work at the time the incident occurred.

The People filed opposition to the petition in November 2005, contending that defendant had not met his burden of showing that no reasonable cause exists to believe he committed the offenses for which he was arrested, charged, and held to answer.

The Hearing on Defendant's Petition

The hearing on the petition was held over five days between June 2, and September 7, 2006. Both parties presented documents and testimony in support of their contentions. The evidence presented was as follows.

The charged offenses occurred in Salinas on February 2, 2004. Officers doing surveillance at Sexton's house saw a car drive up. The passenger of the car got out, walked up to the house, and then walked back to the car. The car, a red Ford Escort, and

the license plate on the car did not match up. The license plate belonged to a Honda. There were two parallel investigations, one started with the license plate, the other started with the Escort. The license plate that was on the Escort belonged on a Honda registered to Sanchez. Sanchez is Garcia's girlfriend. Officer Burnett thought that Garcia resembled the driver of the Escort on February 2, 2004, and that defendant resembled the passenger. Defendant associated with Norteños, so Officer Burnett included defendant's picture in the photographic lineup with Garcia's picture that she showed to Officer Bacis. Officer Bacis identified defendant as the passenger in the Escort, but he was not able to identify the driver. Officers who saw the red Escort at Sexton's residence told Bacis that they would not be able to identify the passenger, so Officer Burnett did not show those officers the photo lineup. Defendant admitted to Officer Burnett on February 22, 2004, and he testified at the hearing on his petition, that he knows both Sanchez and Garcia.

An investigation that started with the car points to Martinez as the owner and driver of the Escort and Espinosa as the passenger. There is a "striking resemblance" between Espinosa and defendant. Martinez and Espinosa are also Norteño gang members, but a photo of Espinosa was not in the photo lineup Officer Bacis assembled. Martinez told defense Investigator Richard Lee that he had been driving the Escort in the days before February 2, 2004, but he claimed that it had broken down and that he had abandoned it in east Salinas. Lee talked with Sexton in jail and Lee showed Sexton a photograph of defendant. Sexton said that the person in the photograph looked like Espinosa, whom he knew as "Evil." Lee talked to Espinosa on October 13, 2004, within 48 hours of talking to Sexton. Espinosa told Lee that he knew Sexton. In addition, Espinosa indicated that he knew Martinez and, in Lee's opinion, Espinosa appeared to be trying to cover something up.

Officer Bacis testified at the hearing that when he compared photographs of Espinosa and defendant, he found them to be very similar, but that he stands by the identification he made of defendant. Officer Bacis also testified that if photographs of

both defendant and Espinosa had been in the photographic lineup shown to him by Officer Burnett, he would have picked both photographs out and the officers would have investigated both defendant and Espinosa. Now that he has seen defendant several times in person, Officer Bacis thinks that defendant "looks like the passenger that was in the vehicle that I saw that day."

Defendant testified that he was not in Salinas on February 2, 2004. He was working in Monterey.

Defendant first asserted that he spent the afternoon before the incident at the Salinas home of the sister of one of his friends because of the Super Bowl. However, after he was shown a declaration signed by his brother, he "remember[ed]" that he went dirt biking in Hollister with his brother and his friend during the Super Bowl.

Defendant admitted pleading guilty in 1999 to attempted robbery, and testified that when he was caught by a police officer who came upon the robbery, he originally denied having anything to do with the robbery. In 1997, when he was a juvenile, he admitted committing a commercial burglary. The computers taken in the burglary were found in a shed at his grandmother's house, where he was living at the time. When first contacted by the police regarding the burglary, he denied any involvement in the burglary.

When Officer Burnett arrived at defendant's home to arrest him on February 22, 2004, and explained to defendant's mother why she was there, his mother stated that she thought defendant was with her on February 2, 2004, even though her day planner for that day did not have defendant's name in it.

In February 2004, defendant and his friend Christopher Gordon worked for Independent Real Estate Research (IRER) in the same cubicle on different computer workstations, although Gordon used defendant's computer on some occasions to download photographs. Gordon could not say where defendant was on the afternoon of Monday, February 2, 2004, but he does remember working with defendant that day and does not remember wondering where defendant was. According to IRER's office records

and defendant's workstation computer records, somebody was using defendant's computer to download photographs and paste them to an appraisal between 2:55 p.m. and 3:39 p.m. on February 2, 2004. Both defendant and Gordon worked on that appraisal. In addition, an appraisal was e-mailed from defendant's computer at 5:35 p.m. that day.

Office telephone records showed that a call was made to defendant's friend Sara Gracia's cell phone from the office at 3:16 p.m. on February 2, 2004, and that the call lasted one-half minute. Gracia did not testify at the hearing, but she signed a declaration stating that Lee's notes of his interview of her "contain the substance of my statement." Lee's notes state that "Ms. Gracia said that she does not know anyone else who works where [defendant] works and no one else from that business would have ever called her."

Gordon accessed defendant's computer on February 24, 2004, after receiving a phone call from defendant from jail. Other people at IRER told Lee that they had access to and used defendant's computer at various times. IRER has 14 employees. Lee seized the original hard drive from defendant's computer on March 6, 2005. On June 2, 2004, Gerald Enders, defendant's uncle and the owner of IRER, told Officer Bacis that defendant and Gordon were at work on February 2, 2004, that Gordon and defendant went out to lunch, that defendant left the business and was out of the office for a while that afternoon, and that he thought defendant returned late in the afternoon. Defendant's uncle also stated that he had spoken to other IRER employees, but none of them could verify that defendant was there on the afternoon of February 2, 2004.

James Huggins, a retired investigator in the district attorney's office, determined that, although an examination by defendant's computer expert was performed on a clone of defendant's computer, the examination was not done with safeguards in place that would avoid corrupting or tainting the information in the computer. In addition, a clone includes only current files from a hard drive; it does not include covered-over deleted files that a forensic examination can retrieve.

Although defendant had DNA testing done on the bandana thrown from the Escort, neither defendant nor the People have had DNA testing done on a pair of gloves that was found in the Escort.

The Trial Court's Decision

The court took the matter under submission on September 7, 2006, and filed its 12-page decision and order on June 12, 2007. In relevant part, the decision states the following.

"Both counsel cite *People v. Adair* (2003) 29 Cal.4th 895 in which the California Supreme Court reviews and analyzes most of the other cases cited by counsel. It is clear from the Court's analysis of the statutory process, standard of proof, evidentiary provisions and case law that the trial court is required to apply a high and stringent standard in allowing relief in these cases in order to ensure, to the extent possible, that relief is allowed only to innocent parties and not to those in which a legal defense is available or where there is solely a lack of sufficient proof."

"The [*Adair*] court . . . observes that all the evidence presented, not just that which would support probable cause for arrest, must be considered. 'In the context of a defendant who seeks a finding of factual innocence notwithstanding probable cause to arrest, facts subsequently disclosed may established the defendant's innocence' [citation]."

"In the instant case, while the investigation 'following the Escort' led to Orlando Espinosa who could have been responsible for the commission of the crime, no indisputable evidence identifies Espinosa as the perpetrator of the crime. On the other hand, it is equally clear that the investigation 'following the cold-plate' led to the defendant. It is noteworthy that both Espinosa and the defendant have strong backgrounds tied to the Norteño street gang consistent with the gang-related aspect of the case. While the current state of the evidence precludes conviction of either the defendant or Espinosa, it does not follow that as to both there is not reasonable cause to believe

either of them committed the offense. On the contrary, as the different investigations ultimately led separately to two look-alike suspects, reasonable cause exists as to each subject."

"Whether or not the evidence shows that the defendant could not have committed the crime involves a more complex analysis.

"Records show that his workstation was active at a time that would make it virtually impossible to have . . . participated [in] the charged offenses if the defendant was the one operating his workstation. No witness directly testified that the defendant was in fact at work at the time. According to the witnesses that testified or gave statements, they generally could not pinpoint when the defendant was at work on the day in question. On one hand, his uncle, Gerry Enders, said he made it his business to know where the defendant was at that workplace, and on the other hand, he testified he could not say when or if the defendant left the office on the date in question. Gerry Enders further testified that it is not his job to watch employees and that it is up to the employees to come in and they are not required to keep track of the hours they work. Defendant's uncle in fact made a statement to an investigator that the defendant was gone for a period of time that day returning late in the afternoon (giving various possible times from 3:30 to 6:00 basing it on the fact there were deadlines to meet) and did not know where his nephew, the defendant, was that afternoon; that only Chris Gordon would know. The uncle also indicated he had inquired of other employees and could find none that could confirm defendant's presence, and no system existed to verify employee presence."

"Other employees had access to defendant's computer. Among others, Chris Gordon, defendant's co-worker and friend ('like a brother') had access and was working on the same jobs as the defendant. He trained the defendant and had a much greater understanding of the work. One of the activities recorded during the relevant timeframe was the 'downloading' of pictures on the defendant's workstation. There were times where Mr. Gordon 'downloaded' pictures on defendant's computer. The pictures were

downloaded so they could be included in a project with which the defendant was helping Chris Gordon, and the deadline for the project was that same day. Chris Gordon was vague about whether or not the defendant was gone that day. Although the evidence certainly tends to establish that defendant's workstation was in use at the relevant time, it does not conclusively establish that the defendant was the one using it.

"Phone records also reflect that a call was made from the business at a time that would virtually make it impossible for the defendant to have committed the crimes charged if he was the one making the call. The call was apparently personal to 'Sarah,' someone the defendant would call. Again this evidence strongly suggests that it could have been the defendant making the call, but it is not conclusive that it was the defendant making the call or that he was not involved in the crimes charged. The phone call lasted only one half of a minute."

"The defendant's adamant denial of fingerprints in the Escort when confronted with the officer's assertion that she found his prints in the car does tend to show that he believed himself to be innocent. However, the inference of defendant's innocence from such conduct was weakened by evidence introduced showing a pattern by the defendant of historically denying criminal activity just as adamantly, only to plead to the charges later on."

"Reviewing the totality of the evidence presented, the court finds the evidence to clearly fall short of proving the defendant committed the offenses charged. The fact that the investigation 'following the Escort' led to look-alike Orlando Espinosa, along with the fact that records of computer activity and phone calls tend to corroborate the defendant's presence at work during the relevant time period, strongly suggests that the defendant did not commit the charged offenses. The inference to be drawn from these records is that defendant was at work using his computer and making phone calls; not wiping a gun clean in a distant city.

"However, 'The terms of section 851.8(b)—precluding a finding of factual innocence "unless no reasonable cause exists"—impose an *objective* legal standard on both trial and appellate courts, and do not accommodate any exercise of [trial court] discretion to which the appellate court should defer.' (*Adair, supra,* at p. 908.) [Emphasis added.]"

"Therefore, this court cannot decide the matter based simply by drawing inferences and making deductions concluding the defendant was at work at the relevant time or that it probably was Orlando Espinosa that committed the offense.

"Other inferences and deductions that could reasonably be made include inferences from conduct tending to show a consciousness of guilt demonstrated by defendant's effort to get his uncle to fabricate, as well as defendant's various inconsistent statements under oath regarding his whereabouts the day before on Super Bowl Sunday; the inference that the defendant was not at work at the time based on the uncle's statement that the defendant was gone for an extended period of time that day, the uncle could find no one to confirm the defendant had been present at the relevant time despite asking employees, that others had access to defendant's computer and could have used it, and the fact that defendant has apparently enjoyed a great deal of support from family members when faced with criminal charges.

" 'Whether considered singly or collectively, the . . . facts and circumstances fail "to show that [no] reasonable cause exists to believe that [defendant] committed the offense" charged. . . .' The record must exonerate, not merely raise a substantial question as to guilt[.] (*Adair, supra,* at p. 90[9].) The record before this court fails to do so, and the *Petition* is therefore denied."

DISCUSSION

The Parties' Contentions

Defendant contends that the trial court erred in denying his petition for a finding of factual innocence. He argues that the trial court misstated the evidence and made factual

findings that are not supported by substantial evidence and that the court ignored other evidence that showed the improbability that defendant committed the charged offenses. He also argues that the trial court applied an incorrect standard. "The standard applied by the trial court required that the defendant prove there was no possible way he could have committed the crime. . . . Penal Code section 851.8 does not require this. It merely requires the petitioner to show that no objective factors exist that can justify the state subjecting the defendant to criminal prosecution. The trial court's errors of law and fact resulted in a denial of the benefits of the factual innocence provisions."

The Attorney General contends that the court did not err in finding that defendant failed to carry his burden of proving factual innocence. "[T]he evidence must exonerate [defendant] rather than raise a substantial question as to guilt." "The question, . . . under *Adair*, is whether no reasonable person looking at the evidence as a whole, would conclude that [defendant] committed the offenses for which he was arrested." "[Defendant] has not shown that no reasonable person could have believed that he was the passenger. He has show[n] only that there was a reasonable doubt that he was the passenger."

In response to our request for supplemental briefs from the parties, defendant "concedes that there was reasonable cause to believe that defendant committed the charged offenses at the time of his arrest." However, defendant contends that, because the facts disclosed subsequent to defendant's arrest show that Officer Bacis's identification of him was mistaken, "the facts exonerate him and establish that the state should never have subjected him to the compulsion of the criminal law." The Attorney General contends that the facts do not establish that the state should never have subjected defendant to the compulsion of the criminal law.

The Statute

Pursuant to section 851.8, subdivision (c), "In any case where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has

occurred, the defendant may, at any time after dismissal of the action, petition the court that dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made." The trial court then conducts a hearing on the petition, at which "the initial burden of proof shall rest with the petitioner to show that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. If the court finds that this showing of no reasonable cause has been made by the petitioner, then the burden of proof shall shift to the [People] to show that a reasonable cause exists to believe that the petitioner committed the offense for which the arrest was made." (§ 851.8, subd. (b).) "If the court finds the petitioner to be factually innocent of the charges for which the arrest was made, then the court shall grant the relief as provided in subdivision (b)." (§ 851.8, subd. (c).) "A finding of factual innocence . . . pursuant to this section shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made." (§ 851.8, subd. (b).)

" 'Establishing factual innocence . . . entails establishing as a prima facie matter not necessarily just that the [defendant] had a viable substantive defense to the crime charged, but more fundamentally that there was no reasonable cause to arrest him in the first place.' [Citation.] A trial court's finding of factual innocence based solely on its own interpretation of the evidence does not sustain the defendant's burden any more than a failure of the prosecution to convict. [Citation.]" (*Adair*, *supra*, 29 Cal.4th at p. 905, fn. omitted.)

"By its terms, section 851.8 precludes the trial court from granting a petition '*unless* the court finds that *no reasonable cause exists* to believe' the defendant committed the offense charged. (§ 851.8(b), italics added.) In other words, the trial court cannot grant relief if *any* reasonable cause warrants such a belief." (*Adair, supra*, 29 Cal.4th at p. 904.) "Accordingly, the statutory scheme establishes an objective standard for assaying factual innocence." (*Id.* at p. 905.) "A trial court must consider the

material, relevant and reliable evidence a petitioner seeks to present before it can apply the requisite 'objective legal standard' to determine whether reasonable cause exists to believe the petitioner committed the offense." (*People v. Chagoyan* (2003) 107 Cal.App.4th 810, 818.) "The present tense 'exists' necessarily means that the existence of reasonable cause depends on the current evidence rather than simply the evidence that existed at the time that the arrest and prosecution occurred. 'In the context of a defendant who seeks a finding of factual innocence notwithstanding probable cause to arrest, facts subsequently disclosed may establish the defendant's innocence.' ([*Adair, supra*,] 29 Cal.4th 895, 905, fn. 4.)" (*People v. Laiwala* (2006) 143 Cal.App.4th 1065, 1068, fn. 3 (*Laiwala*).)

" ' "[F]actually innocent" as used in [section 851.8(b)] does not mean a lack of proof of guilt beyond a reasonable doubt or even by "a preponderance of evidence." [Citation.]' [Citation.] Defendants must 'show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action . . . .' [Citation.] In sum, the record must exonerate, not merely raise a substantial question as to guilt. [Citation.]" (*Adair, supra,* 29 Cal.4th at p. 909; see also *Laiwala, supra,* 143 Cal.App.4th at p. 1069.) To "exonerate" means "[t]o free from responsibility . . . . *Cf.* exculpate." (Black's Law Dict. (8th ed. 2004) p. 616, col. 1.; see also *Central Valley Ch. 7th Step Foundation, Inc. v. Younger* (1989) 214 Cal.App.3d 145, 154, fn. 5 ["We use the terms 'exonerated' and 'exoneration' to refer to the determination by investigating authorities that the suspect was in fact *innocent*."].) " 'Section 851.8 is for the benefit of those defendants who have not committed a crime. It permits those petitioners who can show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action—to purge the official records of any reference to such action. . . . Hence, much more than a failure of the prosecution to convict is required in order to justify the sealing and

destruction of records under section 851.8.' [Citation.]" (*Adair, supra*, 29 Cal.4th at p. 905.)

Standard of Review

As "the statutory scheme establishes an objective standard for assaying factual innocence, . . . it necessarily follows that a reviewing court must apply an independent standard of review and consider the record de novo in deciding whether it supports the trial court's ruling." (*Adair, supra*, 29 Cal.4th at p. 905.) "[A]lthough the appellate court should defer to the trial court's factual findings to the extent they are supported by substantial evidence, it must independently examine the record to determine whether the defendant has established 'that no reasonable cause exists to believe' he or she committed the offense charged. (§ 851.8, subd. (b)." (*Adair, supra*, at p. 897.) " ' " 'Reasonable cause' " ' is a well-established legal standard, ' "defined as that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime." ' " (*Id*. at p. 904; *Laiwala*, *supra*, 143 Cal.App.4th at p. 1069.)

"Since the statute precludes a finding of factual innocence if *any* reasonable cause exists to believe the defendant committed the charged offense, in the case of a denial both the trial court and the reviewing court make the same inquiry. This appears to conflate independent review with the substantial evidence test because the appellate court may approach its task in either of two ways: It may examine the record de novo to determine whether the defendant failed to meet the burden of 'show[ing] that no reasonable cause exists to believe' the defendant committed the charged offense [citations], or it may assess whether the trial court's conclusion to that effect is supported by substantial evidence. Whichever the choice, the analytical perspective is ultimately the same, and the statutory standard is satisfied." (*Adair, supra*, 29 Cal.4th at pp. 907-908; *Laiwala, supra*, 143 Cal.App.4th at p. 1069.)

The Record

On the afternoon of February 2, 2004, an Escort was seen at a Salinas house associated with David Sexton, a Norteño gang member wanted on a weapons charge. The passenger of the Escort walked up to the house and returned to the car. The passenger later threw a gun and a bandana out of the Escort's window. The Escort was abandoned in Salinas around 4:00 p.m. that day in front of Pablo Munoz's home. Two men jumped out of the car and ran.

Officer Bacis, while a passenger in a patrol car, got a good look at the passenger in the Escort for 30 to 40 seconds while they were stopped at a signal at around 3:56 p.m. on February 2, 2004. Officer Bacis had received information about the Escort about five to 10 minutes earlier. He saw the passenger wipe down a gun and then throw the gun and a red bandana out a window of the Escort. He picked out defendant's photo as the Escort's passenger from a 17-photo lineup put together by Officer Burnett, but he was not able to identify the driver. He also identified defendant at the preliminary hearing as the Escort's passenger. When he later compared photographs of Orlando Espinosa and defendant, he found them to be very similar, but he stood by the identification he made of defendant. He testified at the hearing on defendant's petition that, now that he has seen defendant several times in person, he thinks that defendant "looks like the passenger that was in the vehicle that I saw that day." However, he also testified that if photographs of both defendant and Espinosa had been in the photographic lineup shown to him by Officer Burnett, he would have picked both photographs out and the officers would have investigated both defendant and Espinosa.

Officer Burnett was the driver in the patrol car in which Officer Bacis was the passenger. She determined that the license plate on the Escort belonged to a Honda. She did not talk to the registered owner of the Escort, Leon Martinez. Nor did she talk to the registered owner of the Honda, Rosio Sanchez. Officer Burnett thought that Jose Garcia, Sanchez's boyfriend, resembled the driver of the Escort, but she did not talk to Garcia.

She put together a lineup consisting of 17 photographs, including one of Garcia and one of defendant. Defendant associated with Norteños and Burnett thought he looked like the Escort's passenger. Although Espinosa's photo was not in the lineup, there is nothing in the record indicating whether or not Martinez's photo was in the lineup. Officer Burnett showed the lineup to Officer Bacis, but not to Munoz. She did not show the lineup to the officers who saw the Escort at Sexton's residence, because they told Officer Bacis that they would not be able to identify the Escort's passenger.

Martinez, the registered owner of the Escort, told a defense investigator that he had been driving the Escort in the days before February 2, 2004, but he claimed that it had broken down and that he had abandoned it in east Salinas. Martinez is a Norteño gang member. There is nothing in the record to indicate whether or not Martinez resembles the driver of the Escort seen by Officer Burnett, Officer Bacis, or Munoz.

Espinosa is a Norteño gang member who knows both Martinez and Sexton. There is a striking resemblance between Espinosa and defendant, but a photo of Espinosa was not in the photo lineup that Officer Burnett assembled and showed to Officer Bacis.

At the preliminary examination, Munoz was shown the 17-photo lineup that included defendant's and Garcia's photos. He testified that none of the people in the lineup was either the driver or the passenger of the Escort. Munoz also testified that defendant was not one of the men from the car. There is nothing in the record to indicate whether or not Munoz could identify Martinez or Espinosa as either the driver or the passenger of the Escort.

Officers lifted 11 partial fingerprints from the passenger side of the Escort. At least three of the fingerprints were usable but none of them matched defendant's or Espinosa's. There is nothing in the record to indicate whether or not any of the fingerprints matched Martinez's or Garcia's.

The gun thrown from the Escort had been reported stolen in Lake County. A partial DNA profile was obtained from the bandana, and defendant was eliminated as the

donor of that DNA. However, other DNA was present on the bandana in low levels, and no conclusions could be reached regarding the inclusion or exclusion of defendant or any other individual as a possible contributor to that DNA. There is nothing in the record indicating whether or not Garcia, Martinez, or Espinosa was or could be eliminated as the donor of the partial DNA profile. No DNA testing was ever done on a pair of gloves that was found in the Escort.

In February 2004, defendant was on probation for a misdemeanor domestic violence offense, living in Marina, and gainfully employed at his uncle's business in Monterey. Defendant had previously admitted membership in a Norteño gang and had gang tattoos, and he admitted knowing both Garcia and Sanchez. When he was arrested on the charges relating to the Escort and the gun, he denied that he was the passenger in the Escort, he denied that his fingerprints would be in the car, and he asked that the officer who identified him as the passenger be brought in to see him. In 1999 he had pleaded guilty to attempted robbery after originally denying having anything to do with the robbery. In 1997, when he was a juvenile, he admitted committing a commercial burglary after originally denying any involvement in the burglary. Defendant also gave conflicting testimony about his whereabouts the day before the incident at issue.

In February 2004, Christopher Gordon worked in the same cubicle with defendant at defendant's uncle's business. Although they had separate computer workstations, Gordon used defendant's computer on some occasions to download photographs. Other people who worked at the office also stated that they had access to and used defendant's computer at various times. Gordon could not say where defendant was on the afternoon of February 2, 2004. Nor could defendant's uncle or anybody else in the office say where defendant was. Defendant's uncle thought that defendant left the business and was out of the office for a while that afternoon, returning late in the afternoon. Records showed that somebody was using defendant's workstation to download photographs and paste them to an appraisal between 2:55 p.m. and 3:39 p.m. on February 2, 2004. Both defendant and

Gordon worked on that appraisal. An appraisal was e-mailed from defendant's computer at 5:35 p.m. that day.

Office phone records also showed that a call was made to defendant's friend Sara Gracia's cell phone from the office at 3:16 p.m. on February 2, 2004, and that the call lasted one-half minute. Although Gracia told a defense investigator that she does not know anybody other than defendant at that office, and that nobody at the office other than defendant would have ever called her, there is nothing in the record indicating that the person who placed the call from the office actually talked to Gracia or left her a message.

On the day of defendant's arrest, defendant's mother stated that she thought defendant was with her on February 2, 2004, even though her day planner for that day did not have defendant's name on it.

Analysis

Pursuant to section 851.8, defendant had the initial burden of proof at the hearing, and he had to show "that no reasonable cause exists to believe that [he] committed the offense for which" he was arrested. (§ 851.8, subd. (b).) That is, defendant had to " 'establish[] as a prima facie matter not necessarily just that [he] had a viable substantive defense to the crime charged, but more fundamentally that there was no reasonable cause to arrest him in the first place.' " (*Adair*, *supra*, 29 Cal.4th at p. 905.) A "prima facie case" is a "production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." (Black's Law Dict., *supra*, p. 1228, col. 2.; see also, *People v. Duvall* (1995) 9 Cal.4th 464, 474-475 [for a petition for writ of habeas corpus, a prima facie showing is made when, "assuming the petition's factual allegations are true, the petitioner would be entitled to relief"].)

After careful review of the record in this case, we believe that defendant carried his initial burden at the hearing of presenting a prima facie case. Defendant presented a prima facie showing that he was at work in Monterey on the afternoon of February 2, 2004, and not in an Escort in Salinas. He presented a prima facie showing, based on

testimony and a lack of physical evidence, that no person " 'of ordinary care and prudence [would] believe and conscientiously entertain an honest and strong suspicion that' " he was " 'guilty of the crimes charged.' " (*Adair, supra,* 29 Cal.4th at p. 904.)

In this case, we have determined the following from our independent review of the record. The Escort, which had a license plate belonging to a Honda, was seen at the residence of a known Norteño gang member. Defendant has gang tattoos and had previously admitted being a Norteño gang member. Defendant was initially identified as the passenger in the Escort by Officer Bacis, a police officer who pursued the Escort. Officer Bacis testified that even after he saw a photo of Espinosa, another suspect who looked very similar to defendant, he stood by his identification of defendant. Although the officer testified that, if photographs of both defendant and Espinosa had been in the photographic lineup shown to him by Officer Burnett, he would have picked out both photographs and he would then have investigated both suspects in order to try to eliminate one, he testified that he still believed that defendant "look[ed] like the passenger that was in the vehicle that I saw that day." Officer Burnett testified that when she put together photos of defendant and Espinosa, she "could hardly tell them apart." Defendant admitted knowing the alleged driver of the Escort, Garcia, and the driver's girlfriend, Sanchez. Sanchez was the registered owner of the Honda from which the license plate on the Escort came, and Officer Burnett, another officer who pursued the Escort, thought that Garcia looked like the driver of the Escort and that defendant looked like the passenger. Defendant was eliminated as the donor of some of the DNA found on the red bandana thrown from the Escort, but neither he nor Espinosa could be ruled out as a contributor of other DNA found on the bandana, and the latent fingerprints found on the Escort did not match either defendant or Espinosa. Defendant argues that Espinosa was more likely to have been the passenger in the Escort because Espinosa admitted knowing the Escort's owner and Sexton. Defendant presented evidence concerning a telephone call to Gracia, his friend, but Gracia's declaration affirming the investigator's notes

concerning the call, does not conclusively show that defendant made the call to Gracia from defendant's office. Defendant's employer, his uncle, testified that defendant was at work that day but he could not positively account for defendant's whereabouts at the time the Escort was seen and pursued, and neither could any other of the uncle's employees. Defendant's uncle told an officer that defendant left the business and was out of the office for a while on the afternoon at issue, returning late in the afternoon. Although defendant's computer workstation was used at the time of the offenses, other people in the office had access to the computer and had used it in the past in order to do the downloading the computer showed was being done at the time of the offenses. Defendant previously denied being involved in other criminal conduct before later pleading guilty to charges stemming from the conduct; he gave conflicting testimony regarding his whereabouts on the day before the incident, which could call his credibility into question; and his mother asserted that he was with her on the day of the incident, even though there was no other evidence to support her claim.

While many conflicting inferences can be drawn from this evidence, we conclude that defendant carried his burden at the hearing of presenting a prima facie showing that "no reasonable cause exits to believe the arrestee committed the offense for which the arrest was made." (§ 851.8, subd. (b).)

Therefore, the burden shifted to the People "to show that a reasonable cause exists to believe that [defendant] committed the offense for which" he was arrested (§ 851.8, subd. (b)), and that a person " 'of ordinary care and prudence [would] believe and conscientiously entertain an honest and strong suspicion that' " defendant was guilty of the crimes charged. (*Adair*, *supra*, 29 Cal.4th at p. 904.) Then, after considering the People's evidence and any other evidence presented and after reviewing the entire record before it, the trial court could not make a finding of factual innocence "unless the court [found] no reasonable cause exists to believe that [defendant] committed the offense for which" he was arrested. (*Ibid*.)

We cannot discern from the trial court's statement of decision whether the trial court found that defendant carried his initial burden of presenting a prima facie case for relief, and therefore whether the trial court shifted the burden to the People to show that a reasonable cause exists to believe that defendant committed the offenses charged. (§ 851.8, subd. (b).) Since the record is unclear, we will remand the matter to the trial court to permit the court to set forth its findings, keeping in mind the parties' respective burdens as stated in the statute (*ibid.*), our determination that defendant has carried his initial burden of presenting a prima facie case, and the law. The court retains discretion to hold an additional evidentiary hearing before issuing its new decision.

We observe that the parties agree that there was reasonable cause to believe that defendant committed the charged crimes at the time of his arrest. On remand, the ultimate determination to be rendered by the trial court in this case was whether "facts subsequently disclosed . . . establish[ed] the defendant's innocence." (*Adair*, *supra*, 29 Cal.4th at p. 905, fn. 4.) For guidance on remand, we further observe that, after reviewing the entire record, the trial court cannot make "[a] finding of factual innocence . . . unless the court finds that no reasonable cause exists to believe that [defendant] committed the offense for which the arrest was made." (§ 851.8, subd. (b).) When a record establishes that *no* person of ordinary care and prudence would believe and conscientiously entertain an *honest and strong suspicion* that the defendant was guilty, the defendant has established that no reasonable cause exists to believe the defendant committed the offenses charged. (*Ibid.*; *Adair*, *supra*, 29 Cal.4th at p. 904.) A finding of no reasonable cause means that the record exonerates defendant, that it does not merely raise a substantial question as to his guilt. (*Adair*, *supra*, at p. 909.)

We express no opinion on the merits of this case. Based on our independent review of the record, we conclude only that defendant met his initial burden of presenting a prima facie case for relief and that the burden shifted to the People "to show that a

reasonable cause exists to believe that [defendant] committed the offense for which the arrest was made." (§ 851.8, subd. (b); *Adair*, *supra*, 29 Cal.4th at p. 904.)

DISPOSITION

The order of June 12, 2007, is reversed, and the matter is remanded for further proceedings consistent with this opinion.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MCADAMS, J.

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DUFFY, J.